

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2019 IL App (4th) 180827-U

NO. 4-18-0827

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
July 9, 2019
Carla Bender
4th District Appellate
Court, IL

GARY SPRAY,)	Appeal from the
Plaintiff-Appellant,)	Circuit Court of
v.)	Morgan County
THE VILLAGE OF WOODSON,)	No. 17CH43
Defendant-Appellee.)	
)	Honorable
)	Christopher E. Reif,
)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, finding the trial court did not err by granting the Village of Woodson’s motion for summary judgment.

¶ 2 In October 2017, plaintiff, Gary Spray, filed a complaint for trespass to land and for ejectment, alleging the Village of Woodson (Village) without right or permission regularly enters and uses a strip of land on the east side of plaintiff’s property. In June 2018, the Village filed a motion for summary judgment, which the trial court granted.

¶ 3 On appeal, plaintiff argues the trial court erred by finding (1) there was no genuine issue of fact and (2) there was a statutory dedication and acceptance or, alternatively, there was a common law dedication and acceptance. We affirm.

¶ 4 **I. BACKGROUND**

¶ 5 In June 2013, plaintiff acquired the property at 117 East Main Street in Woodson, Illinois. The legal description contained within the deed provided for conveyance of: “Lot One

(1) and Four (4) feet off the East side of Lot Two (2) in Block One (1) in William P. Craig's Addition to the Town of Woodson, Morgan County, Illinois." It was subject to, among other things, "all *** easements; highways, as now located; and any facts or exceptions which would be disclosed by an accurate survey or inspection ***." The property is located in the Northeast Quarter of the Southwest Quarter of Section 28, Township 14 North, Range 10 West of Morgan County, Illinois.

¶ 6 According to plaintiff, the Village has used and maintained a 20-foot-wide strip of land known as Craig Street for the use of the Village in accessing a municipal garage and for the use of the general public as a street or alleyway along the east side of plaintiff's property, and running north and south along the westerly boundary of Blocks Two, Three, and Six of the 1859 plat, which created the Village.

¶ 7 In October 2017, plaintiff filed his complaint for trespass to land and for ejectment against the Village. Plaintiff alleged the Village, through its employees, agents, and invitees, without his permission and against his repeated objection, regularly entered upon the strip of land running on the east side of his property for the purpose of accessing a municipal equipment shed and for general use. Plaintiff also alleged the Village recently paved the strip of land, thereby creating "a thoroughfare across [p]laintiff's property for use by Village employees and the general public alike" and as a result, the Village has interfered with the exclusive use and enjoyment of his property. As a result, plaintiff sought a permanent injunction and an award of monetary damages.

¶ 8 The Village answered, denying plaintiff had any ownership in the strip of land in question and indicating the Village and public have used it as a public street in excess of 20 years. The Village raised two affirmative defenses. First, that the land in question was a public

street, duly dedicated and never vacated. In the alternative, the Village claimed the strip of land had become a public street by prescriptive use. Its four-count counterclaim sought a declaratory judgment asking the court to declare the Village the owner of the land by dedication, prescriptive use, or by operation of statute, and for injunctive relief against the plaintiff.

¶ 9 In June 2018, the Village filed a motion for summary judgment and a memorandum in support of the motion, alleging the Village had a statutory dedication and acceptance. The Village attached two affidavits to the memorandum.

¶ 10 An affidavit from Louis F. Meyer, the chief of surveys at Hutchinson Engineering and a registered professional land surveyor, stated the 1859 plat, which created the Town of Woodson, established a 20-foot-wide alleyway running north and south along the westerly boundary of Blocks Two, Three, and Six.

¶ 11 Meyer prepared a boundary survey, which was included in his affidavit. The alleyway depicted in the survey was the disputed strip of land in this case. The history of the platted and deeded documents for the Village of Woodson is not in dispute. By using the documents and the survey he conducted, Meyer was able to state the west line of the alleyway is located 508.5 feet west of the center of Section 28. After various amendments and sales of portions of property west of the disputed alleyway over the next 24 years, the “middle tract,” as Meyer refers to it, was conveyed to William P. Craig. In 1889, this area was platted as W.P. Craig’s addition to Woodson. By that time, the east-west width of the “middle tract” was 569 feet and was 22.5 feet wider than what was described for the same tract of land in the original 1878 conveyance of the property. That area encompassed the alleyway depicted in the original 1859 town plat. He stated the subsequent 1867 plat corrected an error in Block No. 1 and had no

effect on the established alleyway. To the best of Meyer’s knowledge, the Village never vacated or abandoned the 20-foot-wide alley depicted in the 1859 plat.

¶ 12 The Village also presented the affidavit of Rhonda Cors, a resident of the Village since 1990 and Village President since 2013. She acknowledged her awareness of Craig Street or Craig Drive, the alleyway in question, and that it is used by the general public and maintained by the Village. She was also aware it provided access to a storage building used by the Village since 1993, when the building was constructed. Having conducted a thorough search of Village records, she was unable to locate any record indicating the street/drive had ever been vacated or abandoned by the Village. She attached to her affidavit various municipal documents, maps, photographs, and records relating to costs of repair and maintenance of village streets, including Craig Street/Drive.

¶ 13 Plaintiff filed a written response, which contained no affidavits in support or counter-affidavits to those submitted by the Village. Plaintiff alleged the 1859 plat did not adequately create a statutory dedication since it failed to comply with chapter 25, section 17 of the Illinois Revised Statutes of 1845 (Ill. Rev. Stat. 1845, ch. 25, § 17), which required the plat to particularly set forth all streets, alleys, and lots giving the names, widths, courses and extent of all such streets and alleys. Plaintiff contended the original plat of 1859 “failed to set out the name of or any purpose for the use of the relevant area.” Further, he argued the revised plat of 1867 of the Village “omitted the purported alley here at issue.” He also maintained there was no “acceptance” by the Village of the alleyway in the plat of 1889 for the W.P. Craig’s Addition to Woodson. As a result, plaintiff contended, at best, it could only result in creation of a dedication at common law. Plaintiff noted a common law dedication required (1) an intent on the part of the owner to donate the land for the public use; (2) acceptance by the public; and (3) clear,

satisfactory, and unequivocal proof. Here, he contends no common law dedication existed because there was no clear acceptance by the Village. Arguing these were genuine issues of material fact, plaintiff maintained there was no basis for summary judgment.

¶ 14 The Village replied, asserting the various plats and subsequent actions of the Village established the creation of a statutory dedication or, alternatively, a common law dedication was created with acceptance of the donation. It further maintained plaintiff's failure to submit counteraffidavits or reference other evidence, such as depositions or admissions filed with the court, precluded him from disputing the factual assertions contained in its affidavits and required those facts to be accepted as true. In the reply, the Village attached affidavits from a number of current or former Village residents familiar with Craig Street/Drive and its municipal and public use.

¶ 15 Clyde Jones stated he has resided in the Village since 1969 and between 1941 and 1957 used to visit his grandparents who resided in the Village. Since at least 1941, the disputed portion of land has been known as Craig Street/Craig Drive and was a gravel road. When he created a mobile home park in 1966, he used that road to transport mobile homes and as a method of ingress and egress to the park.

¶ 16 Jeannette Allen stated she has been a resident of the Village since 1951 and at the time, Craig Street/Craig Drive was a gravel road. Also, in her position with the United States Postal Service from 1960 through 1994, she frequently drove on the disputed portion of Craig Street/Craig Drive and saw it used by the general public, including motorists and pedestrians.

¶ 17 Ruth Ann Adams said she resided in the Village between 1951 and 1970 and remembered, as early as 1954, Craig Street/Craig Drive being a gravel road. Jim Burke stated he resided in the Village from 1970 to 1991 with his parents and the disputed land has been known

as Craig Street/Craig Drive since 1971. He used to mow lawns near that area and said it had been oil and chipped since at least 1977. Since 1977, he has observed members of the general public driving on the road, and he drives on that road. He stated Hutchinson Engineering, where he is the vice president, has provided engineering services to the Village for the past 20 years. For motor fuel tax purposes, Hutchinson Engineering has listed the disputed strip of land as part of the Village's public road use inventory. Tom Sheehan resided in Woodson from 1977 through 1989 and said the disputed portion of Craig Street/Craig Drive was oil and chipped in the 1980s.

¶ 18 Plaintiff filed a response to the Village's reply, which essentially repeated the previous response to the Village's summary judgment motion along with copies of the plats and deeds previously tendered by both sides. There were no counter-affidavits attached.

¶ 19 The trial court granted the Village's motion for summary judgment, finding the 1859 plat was dedicated and accepted with the intent to create the alley in question. The court further noted that even if a statutory dedication was not found to have been accomplished, the evidence was sufficient to show a common law dedication. Plaintiff filed a posttrial motion asking the court to reconsider its ruling; the Village filed a response thereto, and the trial court denied plaintiff's motion.

¶ 20 This appeal followed.

¶ 21 **II. ANALYSIS**

¶ 22 Plaintiff argues the trial court erred in granting the Village's motion for summary judgment because there were genuine issues of material fact. We disagree.

¶ 23 "Summary judgment is appropriate where the pleadings, depositions and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Miller v. Metropolitan*

Water Reclamation District of Greater Chicago, 374 Ill. App. 3d 188, 189, 870 N.E.2d 1040, 1041 (2007). In deciding whether summary judgment is appropriate, the trial court must construe the motion and all the evidence against the movant and liberally in favor of the nonmoving party. *Allstar Music, Inc. v. Eckhoff*, 257 Ill. App. 3d 961, 968, 629 N.E.2d 816, 821 (1994). “[G]eneral denials unsupported by any evidentiary facts are insufficient to raise a triable issue as against an uncontroverted evidentiary matter.” *Purdy Co. of Illinois v. Transportation Insurance Co.*, 209 Ill. App. 3d 519, 529, 568 N.E.2d 318, 324 (1991). If a moving party files affidavits in support of its motion for summary judgment, the nonmovant must file counter-affidavits or refer to depositions or admissions on file in order to raise an issue of fact sufficient to survive summary judgment. *Sacramento Crushing Corp. v. Correct/All Sewer Inc.*, 318 Ill. App. 3d 571, 575, 742 N.E.2d 829, 834 (2000). Failure to file counter-affidavits to oppose a motion for summary judgment supported by affidavits is fatal. *Fitzpatrick v. Human Rights Comm’n*, 267 Ill. App. 3d 386, 391, 642 N.E.2d 486, 491 (1994). Uncontested sworn affidavits supporting a motion for summary judgment must be accepted as true regardless of assertions made by the nonmovant in its pleadings. *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 381, 313 N.E.2d 457, 460 (1974). If the moving party supplies facts that, if not contradicted, would entitle it to a judgment as a matter of law, the nonmovant cannot simply rely on its complaint or answer alone to raise genuine issues of material fact. *Carruthers*, 57 Ill. 2d at 380. Whether the trial court correctly decided a party is entitled to summary judgment is a question of law, which we decide *de novo*. *Wright v. St. John’s Hospital of the Hospital Sisters of the Third Order of St. Francis*, 229 Ill. App. 3d 680, 683, 593 N.E.2d 1070, 1072 (1992).

¶ 24 Here, plaintiff, in his response to the Village’s motion for summary judgment, supplied no counter-affidavits in opposition to the Village’s motion for summary judgment and

affidavits in support thereof. The only affidavit filed by plaintiff was in conjunction with his posttrial motion after the court had already ruled in favor of the Village based on the record before it at the time. Besides being untimely (see *Napoli v. Hinsdale Hospital*, 213 Ill. App. 3d 382, 390, 572 N.E.2d 995, 1000 (1991) (stating that an affidavit filed for the first time in a motion for reconsideration need not be considered by the trial court)), the affidavit merely recited plaintiff's ownership of the property described in his deed and the approximate size thereof. Nothing in the affidavit disputed any of the factual assertions of the Village's affiants. Absent an allegation of newly discovered evidence, there was no basis upon which the trial court would consider plaintiff's affidavit. See *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1991) ("The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the court's previous application of existing law.").

¶ 25 Plaintiff argues, alternatively, there was no legal basis upon which to find either a statutory or common law dedication of the property in question and there was no legally sufficient acceptance by the Village.

¶ 26 "A statutory dedication occurs when (1) the property owner files or records a plat that marks or notes the portions of the premises donated or granted to the public and (2) the public entity accepts the dedication." *J&A Cantore, LP v. Village of Villa Park*, 2017 IL App (2d) 160601, ¶ 34, 79 N.E.3d 800.

¶ 27 In Meyer's affidavit, he stated the 1859 plat, which created the Village, contained a 20-foot-wide alleyway running north and south along the westerly boundary of Blocks Two, Three, and Six. The deed was recorded in 1859. Plaintiff contends the 1867 plat revoked the disputed area as a donation to the Village, which contradicts Meyer's affidavit. His contention

arises from the absence of specific notation of the alleyway in the 1867 plat. However, as the Meyer affidavit notes, the 1867 plat, referencing the 1859 plat, says, “The whole agrees with the plat referred to in every particular except in Block No. 1.” Acknowledging the 1867 plat, Meyer said it only modified Block No. 1, which does not affect the alleyway in question and had no effect on the remainder of the 1859 plat. Meyer even explained the origin of the confusion about plaintiff’s deed, which came about when the 1873 deed created the “middle tract” with a width of 546.5 feet. When the property was conveyed to Elizabeth Seegar from Richard Henry in 1881, the width became 561 feet because Henry conveyed more property than he owned or could properly claim he possessed. In 1883, the middle tract conveyed by Seegar to Craig was 14.5 feet wider than the description of the same tract of land in 1873. In 1889, the land was platted by Craig, the subsequent owner to Seegar, alleging a width 22.5 feet wider than the 1873 deed, which includes the alleyway in question. Meyer also attached boundary surveys to illustrate the boundary changes due to the various conveyances. The evidence shows the 1859 plat granted the disputed area to the Village.

¶ 28 “Acceptance of a statutory dedication may be express or implied.” *Republic Bank of Chicago v. Village of Manhattan*, 2015 IL App (3d) 130379, ¶ 20, 32 N.E.3d 1141. “An implied acceptance may be deduced from acts of public authorities recognizing the existence of streets and treating them as public streets. [Citation.] The acceptance of some platted streets raises the presumption of acceptance of all of the streets platted.” *Republic Bank of Chicago*, 2015 IL App (3d) 130379, ¶ 21. Acceptance is timely “if made before the offer to dedicate has been formally withdrawn or revoked by the dedicator.” *Republic Bank of Chicago*, 2015 IL App (3d) 130379, ¶ 22.

¶ 29 From the record, it is clear the 20-foot-wide strip of land located off the west side of Blocks Two, Three, and Six has remained a dedicated alleyway since the 1859 plat. The 1859 plat was recorded in the Office of the Morgan County Recorder and the various streets referred to in the plat are still in existence today. This creates a presumption the alleyway and the other streets named were accepted by the Village. See *Republic Bank of Chicago*, 2015 IL App (3d) 130379, ¶ 21. From the affidavits, it is clear the area was known as Craig Street/Craig Drive from as early as 1941 and was a gravel road. Burke stated in his affidavit his company has listed it on the Village's public-road-use inventory and Hutchinson Engineering has worked with the Village for the past 20 years. Cors attached to her affidavit receipts for maintenance costs for the upkeep of Craig Street/Craig Drive. Plaintiff provides no evidence the dedication was revoked. Plaintiff's only evidence was that Block One of the 1859 plat was amended, which does not prove any change to the streets or alleyways. The uncontroverted evidence presented by the Village showed both a dedication and acceptance with no indication the dedication was ever revoked or the alley vacated. Therefore, the trial court did not err by granting summary judgment for the Village.

¶ 30

III. CONCLUSION

¶ 31

For the reasons stated, we affirm the trial court's judgment.

¶ 32

Affirmed.